

KEMP KLEIN

KEMP, KLEIN, UMPHREY, ENDELMAN & MAY, P.C.
ATTORNEYS

201 WEST BIG BEAVER, SUITE 600 • TROY, MICHIGAN 48064 • (248) 528-1111 • FAX (248) 528-5129 • WWW.KKUE.COM

Richard Bisio
Direct dial: (248) 740-5698
E-mail: richard.bisio@kkue.com

RECEIVED

MAR 24 2003

March 20, 2003

OFFICE OF
THE CHIEF JUSTICE

Mr. Corbin Davis
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Proposed Amendment to MRE 702
File No. 2001-29

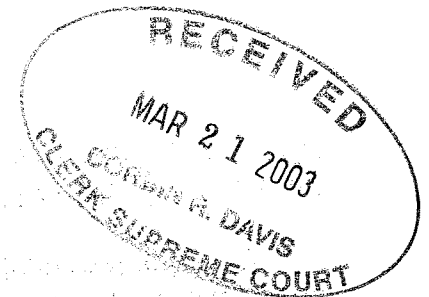
Dear Mr. Davis:

The State Bar Committee on Civil Procedure and Courts submits this comment on the proposed amendments to MRE 702 published on January 28, 2003. The committee adopted its recommendation by a unanimous vote of a majority of the committee at a meeting on March 15, 2003 after written notice. The recommendation is that of the committee only and does not necessarily represent the policy of the State Bar of Michigan.

The committee recommends adoption of proposed alternative A, which would conform the Michigan rule to FRE 702. This is consistent with the committee's recommendation in response to the Court's previous proposed amendment, which was published on January 23, 2002. Reiterating those comments, there are several reasons for supporting adoption of FRE 702 as the Michigan rule:

First, the committee believes that the process of determining whether an expert is qualified is a matter of procedure that the Court should regulate by rule rather than deferring to the legislature (as alternative B would do in part by adopting the text of MCL 600.2955(1)). The Court should exercise its authority over rules of practice and procedure in this area that is arguably well within the Court's constitutional authority.

Second, adopting a rule that governs all types of cases will establish consistent expert qualification standards. Currently MCL 600.2955(1) applies specific standards



only "[i]n an action for the death of a person or for injury to a person or property" and only to "scientific opinion."

Third, the committee believes that the more general language of the federal rule is preferable to the detailed language of MCL 600.2955(1) incorporated in proposed alternative B. FRE 702 sets out the basic principles that a court must apply in determining whether expert testimony is admissible. The more detailed factors in the statute flow from these general principles. Some may apply in a particular type of case and to a particular kind of expert testimony and some may not. There may in addition be other appropriate factors that a court should consider. The federal rule drafters thought it inadvisable to attempt to list specific factors:

No attempt has been made to "codify" these specific factors [the factors listed in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993)]. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho [Tire Co v Carmichael]*, 526 US 137 (1999), see *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment [to FRE 702] are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact.

Advisory committee note to 2000 amendment to FRE 702, 192 FRD 418-419.

Finally, adopting the federal rule language has the advantage of consistency between federal and state practice and will permit application of the significant body of federal case law that will continue to develop under FRE 702.

The committee recommends against adoption of alternative B. That language, an attempted codification of the standards for expert scientific testimony set out in *Daubert*, is too narrowly focused. As noted above, the breadth and variety of possible expert testimony makes it inadvisable to have a single checklist of factors, some of which may not logically apply in a particular case. Moreover, since the *Daubert* factors

Mr. Corbin Davis
March 20, 2003
Page 3

are not exclusive and other considerations may apply in a particular case, it is inadvisable to limit the rule to particular factors. Alternative A gives general guidance while remaining broad enough to incorporate all appropriate factors.

The committee appreciates the opportunity to comment on this proposed amendment.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Bisio", written in a cursive style.

Richard Bisio
Co-Chair, Civil Procedure
and Courts Committee

cc: Committee Members
John Berry, Executive Director, State Bar
Janet Welch, General Counsel, State Bar

353597